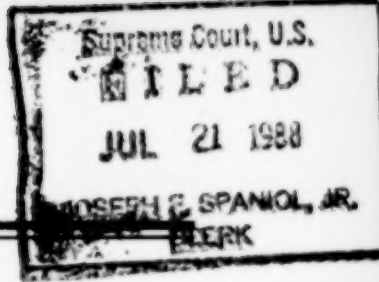


No. 87-1555



IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE
AMERICAN PUBLIC TRANSIT ASSOCIATION
IN SUPPORT OF THE PETITIONERS

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IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE

With the consent of the parties,¹ the American Public Transit Association ("APTA") submits this brief as *amicus curiae* in support of petitioners. It is of vital im-

¹ Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the parties' letters of consent have been filed concurrently with this brief.

portance to public safety that APTA's members—local public transit agencies—have the ability to conduct post-incident drug and alcohol testing of employees in safety-related positions. The Ninth Circuit's decision below jeopardizes their ability to do so and should be reversed.

APTA is the national association representing almost 400 local public transit agencies in the United States and is the nationwide repository of information about public transit systems. APTA's diversified membership includes large, publicly-owned transit systems with extensive bus and rail rapid transit operations serving large metropolitan areas and employing as many as sixty-eight thousand people, as well as small local companies serving rural areas and employing as few as five people. APTA's members also include thirteen commuter rail carriers that are subject to the Federal Railroad Administration's ("FRA") regulations presently before this Court.

The public transit industry has an exemplary safety record. But that record is greatly threatened by reports of the use of illegal drugs and alcohol by employees responsible for providing safe transportation. This threat has been of increasing concern to APTA, whose members provide over 30.5 million passenger trips each workday and over 9 billion passenger trips each year. The safety of these passengers, as well as the safety of transit industry employees, requires that drug and alcohol abuse be eliminated as a factor in transit-related accidents, injuries, and fatalities. Properly conducted drug and alcohol testing programs are an essential part of this safety responsibility. At the same time, however, APTA recognizes that for reasons of fundamental fairness and to satisfy constitutional requirements, such testing programs must provide adequate procedural protections for employees and minimize the intrusion into their privacy.

In September of 1987, APTA adopted a policy statement recommending that each of its member transit sys-

tems establish programs to address the problem of employee drug and alcohol abuse. (See Appendix at 1a-2a). In January 1988, after further study, APTA adopted a second policy statement recommending that Congress authorize the U.S. Department of Transportation ("DOT") to require, as a condition of federal grant assistance, that local public transit systems develop drug and alcohol testing programs. (See Appendix at 3a). DOT recently has proposed regulations, applicable to public transit systems, that would require, *inter alia*, procedures similar to the post-incident testing at issue in this case. See *Control of Drug Use in Mass Transportation Operations*, 53 Fed. Reg. 25910 (1988).

In accepting this case and *National Treasury Employees Union v. Von Raab*, No. 86-1879 (1987), this Court will address drug testing programs applicable to private interstate railroad employees performing essential safety functions in a federally regulated industry and to federal customs employees involved in sensitive enforcement responsibilities. As agencies owned or regulated by state and local governments, APTA's members have sought to achieve a constitutionally acceptable balance of the rights of their employees and the use of drug testing to preserve public safety under a variety of local conditions and circumstances. Indeed, many such members are directly subject to the Fourth Amendment's restrictions against unreasonable searches and seizures. U.S. Const. amend. IV. *Terry v. Ohio*, 392 U.S. 1 (1968); *Mapp v. Ohio*, 367 U.S. 643 (1961). The circumstances facing APTA's members thus present yet another context under which the ultimate question before this Court arises. This Court's guidance undoubtedly will have significant implications for the ability of public transit systems to utilize post-incident drug and alcohol testing to protect public safety under a variety of local conditions.

SUMMARY OF ARGUMENT

Employee drug and alcohol abuse presents a serious threat to passenger safety in many public transit systems. To combat this threat most such transit systems have adopted comprehensive drug and alcohol programs that include some employee testing under specifically defined circumstances. Such circumstances often include post-incident testing procedures similar to those provided for in the FRA's regulations. If allowed to stand, the decision of the Ninth Circuit below would cripple these drug testing programs and jeopardize the ability of transit agencies to ensure the safety of public transit riders, employees and the general public.

To determine whether post-incident testing violates the Fourth Amendment's proscription against unreasonable searches and seizures, the Ninth Circuit should have balanced "the nature and quality of the intrusion . . . against the importance of the governmental interests alleged to justify the intrusion." *O'Connor v. Ortega*, 107 S. Ct. 1492, 1499 (1987) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). In rejecting such testing in the absence of individualized suspicion, however, the court below failed to consider fully the compelling public safety interests served by post-incident testing in contrast to the very limited nature of the intrusion.

Post-incident drug and alcohol testing is essential in providing safe transportation in at least two fundamental respects. First, such testing prevents accidents by deterring employee drug and alcohol abuse. Second, it helps transit agencies determine the causes of those accidents that do occur and thus to take steps to prevent them in the future.

The balancing issue thus presented by the Ninth Circuit's decision does not involve theoretical threats to safety. It only arises in circumstances where public safety in fact has been threatened. The public interest in deter-

mining why safety has been placed in jeopardy outweighs the narrow intrusion on employee privacy needed to help answer this question. Indeed, helping to answer such questions and taking reasonable steps to promote safety are essential parts of a transit employee's job. Furthermore, like railroad workers, transit employees in safety-sensitive positions have been entrusted with a special responsibility for the safety of riders, pedestrians, other drivers and their passengers and fellow employees under conditions where mental alertness and physical agility are absolute job prerequisites. For example, in an industry where operational error is the primary cause of accidents, bus drivers maneuver oversized vehicles in congested city streets avoiding darting pedestrians and dauntless drivers. They are expected to maintain order in a crowded bus and to respond quickly and skillfully in emergency situations. As common carrier operators, they are held to a higher standard of care and have a reduced expectation of privacy in the performance of their public responsibilities.

The court below also failed to consider the carefully limited nature of any intrusion into employee privacy. The expressly defined safety-related conditions that must precede post-incident testing clearly restrict supervisor discretion in ordering tests and limit the intrusion to circumstances directly related to the safety issue. Nor did the court consider the procedural protections that are designed to minimize risk of error and abuse of the testing procedure and to accord employees an opportunity to contest the findings and consequences of the test. Instead, the court focused solely on the intrusive nature of drug tests generally and virtually ignored the narrow and exceptional circumstances under which they are required to meet a vital safety interest when used only after accidents and other safety-related incidents.

The Ninth Circuit's requirement of individualized suspicion is completely impracticable in the real world of

public transit operations. Unlike alcohol abuse, impairment due to drugs is frequently very difficult for even trained observers to detect. This difficulty is accentuated under the chaotic circumstances in which an investigator would have to make such a determination (*i.e.*, shortly after a serious accident or incident). Under the distorted logic of the Ninth Circuit, in applying a balancing test to drug testing, a higher public interest value would be placed on protecting horse-race betting in New Jersey than on protecting the personal safety of common carrier passengers in California. The decision below, if allowed to stand, will adversely affect public safety by crippling the ability of transit agencies to deter drug and alcohol abuse by employees and to determine the causes of accidents.

ARGUMENT

A. Drug And Alcohol Abuse Pose A Significant Threat To Safety In The Public Mass Transportation Industry

The reasonableness of post-incident drug testing regulations depends in part on the scope of the safety problem faced by employers in the public mass transportation industry. Drug and alcohol abuse are national problems that have demanded the attention of the White House, Congress and state and local governments in recent years. Recent surveys suggest that a substantial percentage of the American public use illegal drugs or are problem drinkers.²

² Despite recent declines in the use of such drugs as cocaine, the United States still has "the highest rates of illicit drug use of any country in the industrialized world" according to a recent survey of high school seniors and young adults conducted by the University of Michigan. That survey shows that in 1987, 57% of high school seniors had tried an illicit drug, 36% had tried an illicit drug other than marijuana, 42% had used an illicit drug in the past year and 24% used a drug other than marijuana. University of Michigan, News and Information Service at 5 (Jan. 12, 1988). The National Institute on Drug Abuse recently reported that "[b]y their mid-

The high incidences of illegal drug and alcohol use in the United States are of concern to most employers. Public mass transit agencies have no reason to assume that their employees are less affected by these national problems than the general public, especially since transit services are concentrated in large urban areas where most transit employees reside and where drug use is most pervasive.³ Unlike many other employers, however, transit

twenties, nearly 80% of today's young adults have tried an illicit drug, including some 60% who have tried some illicit drug other than (usually in addition to) marijuana." L. Johnston, P. O'Malley & J. Bachman, *National Trends In Drug Use And Related Factors Among American High School Students And Young Adults, 1975-1986*, at 23 (1987) (emphasis in original). Moreover, "[b]y age 27, roughly 40% have tried cocaine." *Id.* (emphasis in original). As alarming as the rates of illicit drug use in this country are, they are equalled or surpassed by those for alcohol abuse. The U.S. Department of Health and Human Services recently reported that "[a]n estimated 18 million adults 18 years old and older currently experience problems as a result of alcohol use." *Sixth Special Report to the U.S. Congress on Alcohol and Health* at 12 (Jan. 1987). Alcohol accounts for approximately 97,500 deaths annually, including some 37,849 deaths due to alcohol-related accidents. *Id.* at 6.

³ For example, the New York Times has reported that "roughly one out of three applicants for entry level jobs with the New York Transit Authority failed the Authority's mandatory drug test." The failure rate is significantly higher than the rate for applicants for other City agencies that administer drug tests to prospective employees, *e.g.*, the failure rate for applicants to the New York City Police Department in 1986 was 2.2%. See Kolbert, *1 Of 3 Fail Drug Tests For Bus Jobs*, N.Y. Times, Sept. 21, 1987, at B1, col. 6. Similarly, the Los Angeles Times reported that 11% of the Southern California Rapid Transit District's bus drivers tested positive for drug use in the first year of its program. Connell, *11% Of RTD Bus Drivers Given Tests Used Drugs*, L.A. Times, Sept. 17, 1986, § 2, at 1. Approximately 10% of those drivers tested positive after being involved in an accident. *Id.*

In August of 1986, Jim Burnett, chairman of the National Transportation Safety Board ("NTSB"), wrote to APTA to express the NTSB's concern about drug and alcohol abuse in the public

agencies—like railroads—face serious consequences for public safety as well as financial liability for accidents occurring as a result of drug and alcohol abuse. This concern for safety is the stated purpose of the FRA regulations—“to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.” 49 C.F.R. § 219.1(a) (1987). This same concern for safety underlies the post-incident drug and alcohol testing programs employed by many local public transit agencies, which respond to local conditions and reported instances of drug use by transit employees in the community.

B. Properly Conducted Post-Incident Drug And Alcohol Testing Does Not Violate The Fourth Amendment's Prohibition Against Unreasonable Searches And Seizures

The question presented here is whether post-incident testing is a reasonable intrusion into the personal privacy of those railroad and transit employees covered by the FRA regulations or by local drug testing programs, or whether such testing constitutes an unreasonable search proscribed by the Fourth Amendment.⁴

transit industry. In that letter, Mr. Burnett reported on the NTSB's investigation of five rail rapid transit accidents in which licit or illicit drug use was an issue. Letter from Jim Burnett to Jack Gilstrap at 1 (Aug. 13, 1986). Fifteen persons were killed in these accidents, more than 350 persons were injured and more than \$5 million in property damage was reported. *Id.*

⁴ APTA recognizes that the drug and alcohol tests at issue in this case are “searches” within the meaning of the Fourth Amendment. This Court has held that blood tests are subject to constitutional scrutiny. *Schmerber v. California*, 384 U.S. 757, 767 (1966). And numerous lower courts have reached similar conclusions with respect to urine and breath tests. See, e.g., *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986). The parties and the Ninth Circuit also agreed that because of “the exigencies of testing for

To determine the standard of reasonableness applicable in this case, the public interest in protecting and promoting transportation safety must be balanced against the interests of those employees affected by testing. See, e.g., *O'Connor v. Ortega*, 107 S. Ct. at 1499-1503; *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1967). As this Court stated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), “what is reasonable depends upon the context within which a search takes place.” *Id.* at 337. See also, *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (“The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.”)

The Ninth Circuit purported to strike this balance, finding that the FRA regulations could pass constitutional muster only if individualized suspicion served as a predicate for all testing conducted thereunder. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 589 (9th Cir. 1988). As shown below, however, the Ninth Circuit's analysis, as it affects local public transit, fails to comprehend the multifaceted public safety interests served by post-incident testing. Moreover, in the chaotic circumstances of a transit accident, the court's conclusion that the requirement of individualized suspicion “poses no insuperable burden on the government” is simply naive. *Burnley*, 839 F.2d at 588. In today's transit environment, the fact of the accident itself constitutes a reasonable basis for testing to serve a safety-related purpose.

1. Post-Incident Testing Serves The Compelling Public Interest In Protecting Public Safety

Neither the parties nor the Ninth Circuit has disputed the overall safety purpose of the FRA regulations

the presence of alcohol and drugs in blood,” no warrant is required for this type of body fluid testing. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 583 (9th Cir. 1988). See *Schmerber*, 384 U.S. at 770-71.

—to prevent accidents that result from drug and alcohol abuse. The public interest in protecting safety and health, as this Court has held, can justify searches in the absence of traditional probable cause or individualized suspicion. *Camara v. Municipal Court*, 387 U.S. at 535. As an essential component of a safety regulatory program, post-incident testing serves several purposes. The Ninth Circuit focused primarily on a single rationale for post-incident testing, *i.e.*, holding the employee accountable by determining whether he or she was impaired by drugs or alcohol at the time of a particular accident or incident. *Burnley*, 839 F.2d at 588. The FRA regulations and similar post-incident testing programs in public transit systems, however, serve other vitally important safety functions, which are detailed below.

Post-incident testing helps transit agencies to determine the causes of particular incidents.⁵ In the case of a bus accident, for example, the driver would be tested to determine whether drug or alcohol impairment may have played any role in the accident. The investigator properly will want to eliminate drug abuse as a causal or contributing factor as he or she seeks to reconstruct the

⁵ The Ninth Circuit was concerned that drug tests do not always demonstrate whether an employee was impaired at the time of an accident. *Burnley*, 839 F.2d at 588-89. But this does not diminish their value to an investigation of the causes of an accident. Test results are certainly highly probative evidence in such an inquiry. Illicit drugs can adversely affect motor skills and judgment, which are obviously vitally important to the operation or maintenance of a transit vehicle. *See, e.g.*, 53 Fed. Reg. at 25911-25913. And certainly an employee who tests positive for drug use after a serious incident is more likely to have been impaired at that time than an employee whose test is negative. The utility of post-incident testing, therefore, cannot be viewed in isolation. It is one part of an investigation, not the entire investigation itself. Where no other reasonable explanation for a particular accident surfaces, positive test results may prove to be conclusive. However, where other significant factors arise (*e.g.*, road or rail conditions, or equipment failure), such tests results may not be conclusive.

facts surrounding the accident. In the case of a serious rail incident the scene is often chaotic. When management or investigators arrive at the scene, the cause of the accident may not be readily evident. It is difficult if not impossible to determine which members of a train crew, if any, played a role in the events leading up to the accident. Often initial suppositions prove to be wrong.⁶ There is a narrow window in which an investigator can determine whether drug or alcohol impairment contributed in any way to the accident itself or its severity. It is, therefore, reasonable in such circumstances to test an entire train crew, as is required by the FRA regulations, *see* 49 C.F.R. § 219.203(a) (1987), and many local transit programs. If testing is delayed until all of the circumstances of an accident have been investigated and the role of specific employees identified, testing may be too late to help determine the cause of the accident. Evidence of drug or alcohol use could disappear during the intervening period or a positive finding could reflect alcohol or drug use after the accident.

A negative test result can be equally as important in determining the cause of a particular accident. Eliminating drug impairment as a potential cause of an accident helps establish the significance of other potential causes (*e.g.*, equipment failure, inadequate training or poor safety procedures) and suggests a more thorough examination of them. Frequently, as a result of such an examination, equipment modifications, changes in operational rules or training improvements are made. Accident in-

⁶ For example, it was initially unclear who or what had caused the tragic collision between an Amtrak passenger train and three Conrail locomotives that occurred near Baltimore, Maryland in 1987. Investigators could not determine whether human error or a mechanical failure was responsible for the accident when they first arrived at the accident scene. Stuart, *U.S. Cites Amtrak For Not Conducting Drug Tests*, Washington Post, Jan. 8, 1987, at A20, col. 4. Details of the accident continued to emerge in the days and weeks that followed.

vestigations are a primary source of information leading to accident prevention and improved safety.

Post-incident testing also allows transit agencies to determine whether a particular incident was made worse by employee impairment. A bus driver or members of a train crew not only have responsibilities for the safe operation of their respective vehicles, but they also must be able to respond appropriately in the event of an accident or other emergency. An employee who is unable to perform a vital task after an accident (*e.g.*, helping to evacuate passengers or extinguishing a fire) may be responsible for injuries or damages that were not directly caused by the accident itself.

Post-incident testing helps to identify those employees in need of treatment for drug and alcohol abuse, as well as identify those employees who should be removed from service because of their inability to respond to such treatment. Testing will also help employers assess the magnitude of any drug or alcohol problem in their respective work forces and respond with such additional programs and procedures as are necessary. It also will help to ensure continued public confidence in the transportation system.

Post-incident testing further serves to deter the use of illegal drugs and alcohol by covered employees. Any employee in a safety-sensitive position knows that he or she is likely to be tested upon the occurrence of any of the specified incidents. Since no individual can be certain that he or she will not be involved in such an incident, post-incident testing likely will reduce the risk that employees will be impaired by drugs and alcohol while on the job.

Finally, post-incident testing and its deterrent effect on drug and alcohol abuse will help lower the financial risks transit agencies and individual carriers must bear. Accidents caused by employee impairment are ultimately

paid for by transit agencies and consumers. Increased insurance premiums, property damages, and compensatory damages for those persons injured or killed in such accidents all justify employers' attempts to take reasonable steps to prevent them. The type of post-incident testing contemplated by the FRA regulations is such a reasonable step.

2. A Requirement Of Individualized Suspicion As Defined By The Ninth Circuit Is Impractical And Constitutionally Unnecessary In The Post-Accident Environment

Application of the standard of individualized suspicion suggested by the Ninth Circuit would jeopardize accident investigations. Instances in which drug impairment caused or contributed to an accident could go undetected.

Even for the trained observer, impairment due to drugs is difficult to detect without toxicological testing. Motor skills or judgment may be impaired by drugs without any of the outward signs commonly associated with alcohol (*e.g.*, smell or slurred speech). Moreover, individuals who appear to function normally while impaired by alcohol or drugs are not uncommon in the workplace. But their presence in an industry that carries millions of people each day is extremely dangerous.

Making the individual suspicion determination is especially difficult for an investigator during the disarray following a major accident or incident.⁷ The behavior

⁷ The incidents that trigger testing are extremely serious and the accident scenes are likely to be chaotic. The FRA regulations provide for mandatory testing for accidents involving fatalities, the release of hazardous materials that causes an injury or evacuation, or damage of \$500,000 or more, collisions with injury or damage of \$50,000 or more, or train incidents that fatally injure any on-duty railroad employee. 49 C.F.R. § 219.201(a)(1)-(3) (1987). Under such circumstances, it is unreasonable to impose on the investigator the additional burden of determining which if any employees appear to be impaired by drugs or alcohol.

of individuals at such a scene will likely be affected by the trauma of events and the investigator undoubtedly will have other pressing responsibilities that must be carried out expeditiously.

This Court has found that while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.'" *New Jersey v. T.L.O.*, 469 U.S. at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. at 560-61). The Ninth Circuit's requirement of individualized suspicion would perhaps be reasonable if the primary purpose of the FRA regulations and post-incident drug and alcohol testing generally was to identify and punish the individual employee testing positive. But the purpose of post-incident testing is to prevent accidents and protect public safety by deterring drug and alcohol abuse by transit workers and to determine the causes of those accidents that do occur, both of which are essential components of any safety program. These public safety interests are not well-served by the Ninth Circuit's requirement of individualized suspicion. See, e.g., *Camara v. Municipal Court*, 387 U.S. at 539 (contrasting administrative search involving health and safety with criminal investigation). Under the Ninth Circuit's standard, the causes of serious accidents would be left undetermined and the deterrent effect of testing would be diminished substantially. Rather than being certain that he or she would be tested upon the occurrence of certain enumerated events, an employee using drugs or alcohol could avoid testing, even after a serious accident, as long as he or she gave no outward appearance of being impaired to an investigator.

A determination based on individualized suspicion as the Ninth Circuit would require is not constitutionally required in the post-accident context. For in the extraordinary circumstances surrounding a major train or

transit accident in today's operating environment, there is substantial reason to doubt the Ninth Circuit's conclusion that serious train accidents or incidents do not themselves "create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew." *Burnley*, 839 F.2d at 587.

This Court has stated that the reasonable or individualized suspicion standard is satisfied where the searching official is "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). A rail or bus accident is a "clearly articulable fact" from which impairment by drugs or alcohol is one reasonable inference. Bus drivers, rail operators and other transit workers with safety responsibilities are highly skilled employees who receive a great deal of training to perform their jobs. In an industry in which billions of passenger trips are made every year, serious accidents or incidents are quite rare. Unlike accidents involving passenger cars, serious bus or rail accidents are not routine occurrences. Those incidents that do occur frequently involve human error.

When a skilled professional is involved in a rare accident for which human error is frequently responsible, it is not unreasonable to suspect impairment. This is especially true in an industry such as public transit, where safety rules are numerous and vigorously enforced, with sanctions imposed on those who violate them. In such an industry, it is less likely that mere complacency, inattentiveness or recklessness, uninduced by any outside stimulant, would cause a serious accident or rule violation. As this Court found in *Brignoni-Ponce*, the characteristics or behavior of the individual suspect are not the only factors that can give rise to reasonable suspicion. In that case, this Court found that more gen-

eral factors such as "the characteristics of the area[,] . . . the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant" when the Border Patrol determines whether it has reasonable suspicion to stop a particular car. 422 U.S. at 884-85. Similarly, a serious transit incident is the kind of general factor from which one could reasonably suspect impairment. The fact that other potential causes of the incident (*e.g.*, highway or rail conditions, equipment failure or human error unrelated to drugs or alcohol) could also reasonably be inferred does not diminish the reasonableness of suspecting drug or alcohol use as a possible cause or contributing factor. Impairment, therefore, is a reasonable inference from a serious transit incident in today's operating environment. Thus, individual employees' involvement in the occurrence of specified incidents, such as those set forth in the FRA regulations, constitute a constitutionally reasonable basis for testing for safety-related purposes.

C. Employees Who Operate Trains Or Mass Transit Vehicles Have A Reduced Expectation Of Privacy That Is Outweighed By The Public's Safety Interest

When the compelling public interest in protecting transportation safety is balanced against the interest of common carrier employees subject to post-incident testing, such testing is clearly reasonable. As this Court stated in *New Jersey v. T.L.O.*, "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.'" 469 U.S. at 342 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979)). The post-incident testing provided for in the FRA regulations meets this standard.

1. The Privacy Interests Implicated By Post-Incident Drug And Alcohol Testing Are Minimal

The privacy interests implicated by post-incident testing are minimal because railroad employees or public transit workers in safety-related positions have a reduced expectation of privacy. The railroad industry is heavily regulated by the Federal government, and its employees, therefore, have a more limited expectation of privacy than employees in private industries. See *Donovan v. Dewey*, 452 U.S. 594, 600 (1981); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986). The same is true of employees of private mass transit companies, which are generally heavily regulated by state and local governments. Similarly, many public transit workers are actually employed by local governments and while such employees "do not lose Fourth Amendment rights merely because they work for the government instead of a private employer" the "operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable. . . ." *O'Connor v. Ortega*, 107 S. Ct. at 1498.

This Court has held that government agencies may place reasonable conditions on public employment. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). It is certainly reasonable for local governments to "insur[e] that bus and train operators are fit to perform their jobs." *Division 241, Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976). Like the court in *Suscy*, other courts have found that a local government's interest in safety can outweigh the privacy interest of transit employees in safety-sensitive positions. See, *e.g.*, *Jones v. McKenzie*, 833 F.2d 335, 340 (D.C. Cir. 1987) (upholding testing for school bus attendants responsible for supervising, attending and transporting handicapped children); *Burka v. New York City Transit Authority*, 680 F. Supp. 590, 607 (S.D.N.Y. 1988) (upholding against employees' motion for summary judgment).

ment testing program for mass transit workers because of local government's safety interest).

Transit workers and railroad employees are responsible for carrying millions of passengers on public highways and railways each year. And yet, under the Ninth Circuit's analysis, these individuals effectively have the same expectation of privacy on matters of drug or alcohol abuse as the average motorist. See *Schmerber v. California*, 384 U.S. at 768-70 (requiring individualized suspicion to justify blood test of motorist). The Ninth Circuit's position is simply untenable. Bus drivers, railroad workers and other transit workers are not everyday motorists. They are skilled professionals responsible for the lives of many innocent people. As such, they have a diminished expectation of privacy with respect to the state of their physical and mental condition as they perform their work.

2. Safeguards Exist To Protect Employee Privacy And Limit Discretion Of The Official In The Field

Post-incident testing by its very nature greatly limits the discretion of supervisors to order tests and restricts testing to legitimate safety purposes. Testing is triggered in most instances by specific occurrences—serious accidents or incidents—over which the supervisor or manager has no control. This necessarily greatly limits the discretion of the “official in the field,” *New Jersey v. T.L.O.*, 469 U.S. at 342 n.8, and avoids the risk that testing could be abused or used to harass individual employees. Moreover, the procedures for conducting the tests are reasonable and serve to limit their intrusiveness.

Under the FRA regulations, the testing policy is clearly set forth and all covered employees have received notice of those events that will trigger testing. As the Ninth Circuit pointed out, the tests themselves are reasonable in that they are performed in medical facilities and only personnel of the medical facility may supervise

the urine testing procedure. *Burnley*, 839 F.2d at 589. The regulations also provide for a chain of custody and handling of samples. 49 C.F.R. §§ 219.205, 219.211, 219.305(b) (1987); retesting after positive initial test results, 49 C.F.R. §§ 219.303(d)(2), 219.307(b) (1987); and employee notice and an opportunity to comment on results, 49 C.F.R. § 219.211(a)(2) (1987). Under Subpart D of the regulations an employee whose urine test is intended for use in any railroad disciplinary proceeding may request a more accurate blood test. 49 C.F.R. § 219.305(d) (1987). In addition, any employee testing positive would have the opportunity to challenge the test results and any proposed sanctions in a railroad disciplinary proceeding.⁸

The procedural protections provided in the FRA regulations limit the intrusiveness of testing and reasonably protect the employee's privacy interest from abuse by the discretion of railroad supervisors. Similar procedures can be found in the post-incident testing programs of many local transit agencies.⁹ As Judge Alarcorn stated

⁸ The court below was concerned that existing drug testing technology does not always allow a transit agency or a railroad company to determine whether an employee was impaired at the time of an accident. There is a risk, therefore, that post-incident testing may reveal evidence of off-duty drug use that did not cause or contribute to the particular accident at issue. This is not an unreasonable risk, however, for someone who chooses to work in a profession with such profound responsibilities for public safety.

Moreover, a transit industry employee, like a railroad employee, may contest in a disciplinary or other proceeding the accuracy of the test and the appropriateness of any sanctions under applicable local policies and procedures. Until improvements in technology allow agencies to determine what level of drug use actually impairs an employee, post-incident testing and the disciplinary process is a constitutionally reasonable method to protect both the public safety interest as well as the interest of the employee.

⁹ Though their exact parameters vary, the procedural safeguards provided by local public transit programs incorporate the basic elements of the FRA regulations and related state and federal laws.

in his dissent below, these procedural protections for employees "bring the time and place of the testing within reasonable bounds," *Burnley*, 839 F.2d at 597 (Alarcorn, J., dissenting), and provide an adequate substitute for a warrant. *Id.* at 594. Given the compelling interest local governments have in protecting public safety, similar procedural safeguards satisfy the requirements of the Fourth Amendment under both the administrative search standard applicable to closely-regulated industries, see *New York v. Burger*, 107 S. Ct. 2636, 2643 (1987); *Donovan v. Dewey*, 452 U.S. at 601-03 (1981); and the traditional reasonableness standard applicable to most warrantless searches, see *O'Connor v. Ortega*, 107 S. Ct. at 1501; *New Jersey v. T.L.O.*, 469 U.S. at 341.

They provide for advance notice to employees, test procedures that minimize the intrusiveness of the tests and ensure the integrity of their results, the opportunity to contest the results of a particular test or the imposition of sanctions and reasonable confidentiality of test results.

CONCLUSION

Post-incident drug and alcohol testing serves the government's compelling interest in protecting public safety by deterring drug and alcohol abuse by railroad workers and transit employees in safety-sensitive positions and by helping transit agencies determine the causes of those accidents that do occur. Because the public safety interest served by post-incident testing outweighs the privacy interest of common carrier employees subject to such testing, the FRA regulations at issue do not violate the Fourth Amendment's proscription against unreasonable searches and seizures. Therefore, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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APPENDIX

AMERICAN PUBLIC TRANSIT ASSOCIATION
POLICY STATEMENT ON DRUG AND
ALCOHOL ABUSE

The transit industry recognizes the critical and growing problem drug and alcohol abuse poses in our society and in the workplace. The transit industry is committed to maintaining and improving our safety record by taking a strong stand against drug and alcohol abuse by transit employees. Therefore, the members of the American Public Transit Association call upon every public transit system to establish policies and implement the necessary programs to combat drug and alcohol abuse. The objective should be nothing short of a drug and alcohol free workplace.

Each transit system should evaluate and implement policies and programs based on a consideration of all factors including:

- (1) the transit industry's fundamental obligation to our passengers and the general public for providing safe, efficient, and economical transit service;
- (2) the appropriate balance between the rights of employees and necessary work rules to ensure a drug and alcohol free workplace;
- (3) special local circumstances including the scope and magnitude of drug and alcohol abuse in the community and within the transit system;
- (4) the developing legal and technical framework concerning drug and alcohol testing;
- (5) the expertise and views of local, state, and federal agencies such as the National Transportation Safety Board on such matters as pre-employment testing, post accident testing, the use of safety-

sensitive employees of prescription drugs, and employee assistance programs.

To assist in this effort, the American Public Transit Association will continue its program of sharing technical information with its members and providing leadership in the exchange of ideas and techniques to combat drug and alcohol abuse.

Adopted by APTA Executive Committee: 9/87

AMERICAN PUBLIC TRANSIT ASSOCIATION POLICY STATEMENT ON TESTING OF TRANSIT EMPLOYEES FOR DRUG AND ALCOHOL ABUSE

In view of the *Policy Statement on Drug and Alcohol Abuse* adopted by the Association calling for every public transit system to, ". . . Establish policies and implement the necessary programs to combat drug and alcohol abuse. . .", the members of the American Public Transit Association hereby adopt this policy supporting the establishment of the following provisions on testing of transit employees for drug and alcohol abuse:

1. That Congress provide the United States Department of Transportation the authority to require, as a condition of federal grant assistance, the development by local public transit systems of a program for drug and alcohol testing of transit workers.
2. That regulations implementing such authority be developed through a review and hearing process involving the transit industry.
3. Any such regulations be accompanied by necessary funding support.

The American Public Transit Association will assist in this effort, and will continue its program of sharing technical information on drug and alcohol testing with its members and providing leadership in helping its members to provide drug and alcohol free workplaces.

Adopted by APTA Executive Committee: 1/23/88